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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SU-CHIN LIN SHEN, Plaintiff and Appellant, v. NEW CENTURY ESCROW, INC., Defendant and Respondent.	B198758 (Los Angeles County Super. Ct. No. BC354773)

APPEAL from an order of the Superior Court of Los Angeles County, Mary Ann Murphy, Judge. Affirmed.

Shahbaz Law Group and Jacob A. Shahbaz for Plaintiff and Appellant.

Law Offices of David B. Bloom, Stephen Monroe and Shelley M. Gould for Defendant and Respondent.

INTRODUCTION

This appeal involves the interpretation of very broad indemnity provisions found in escrow instructions signed by parties to the escrow. The parties agreed to indemnify the escrow company for any costs (including attorney fees) it incurred in good faith as a result of litigation arising out of the escrow. After the escrow closed, one of the buyers who had signed the escrow instructions (appellant Su-Chin Lin Shen) sued the escrow company (respondent New Century Escrow, Inc.), raising multiple tort claims based upon its handling of the escrow. The escrow company repeatedly explained to the buyer that all of her causes of action lacked merit. It offered to waive any claim for costs if the matter were immediately dismissed, but stated that if buyer continued to prosecute her action, it would hold her liable for its attorney fees and costs under the escrow indemnification provisions. Buyer maintained the action for five months before dismissing her claims against the escrow company without prejudice. Thereafter, the escrow company, citing the indemnification provisions in the escrow instructions, moved for an award of costs, including attorney fees, that it had incurred in defending against the buyer's lawsuit. After conducting two hearings, the trial court granted the motion.

This appeal by buyer contends that she never agreed to the indemnification provisions (although she conceded that she had signed them); that the indemnification provisions cover only third-party claims (even though the broad language embraces first party claims); and that her duty to indemnify could be determined only after a trial on the merits (notwithstanding decisional and statutory law that attorney fees can be awarded as costs following a noticed motion when the fee claim is based upon a contractual provision). We reject all of buyer's contentions and therefore affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Escrow*

Appellant Su-Chin Lin Shen (Shen) and her husband owned a 50 percent interest in a parcel of commercial real estate located in El Monte. Golden Bull Investment LLC (Golden Bull) owned the other 50 percent. Mei-Chu Chen (Chen) agreed to buy Golden Bull's 50 percent interest in the El Monte property. The parties retained respondent New Century Escrow, Inc. (New Century) to handle the escrow. Helen Suh (Suh), president of New Century, was the escrow officer.

The escrow instructions, executed in November 2004, consist of seven consecutively numbered pages. The first four pages are entitled "Sale Escrow Instructions." The introductory paragraph of the instructions identifies Chen as the buyer and Golden Bull as the seller. The instructions recite that Chen would take title to Golden Bull's "undivided fifty percent (50%)" as "A Single Woman" and that Shen and her husband would retain their 50 percent interest in the realty as tenants in common. At the bottom of page three is a paragraph reading: "We, jointly and severally, acknowledge receipt of a complete copy of the within escrow instructions and by our signatures set forth below, acknowledge that we have read, understand and agree to be bound by the terms and conditions contained therein, in their entirety." (Capitalization omitted.) The paragraph is followed by the phrase "Buyer's Signature." Under it, Chen's name is typed. Chen's attorney-in-fact signed on her behalf.[1] To the right of Chen's signature, four other individuals signed and printed their names, including Shen and her husband. In addition, at the bottom of pages one and four, Shen placed her initials in the area labeled

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[1] Chen's attorney in fact is Su-Chu Wang.

"BUYERS INITIALS" above which appeared the phrase: "My initials below represent my agreement and acknowledgement of the foregoing." (Italics omitted.)

The last three consecutively numbered pages are a document entitled "Additional Escrow Instructions and Provisions." It consists of 28 paragraphs. The second section of paragraph 21 is one of the indemnity provisions upon which New Century relies. Paragraph 21 reads, in toto:

> "21. The parties shall cooperate with you in carrying out the escrow instructions they deposit with you and completing this escrow. The parties shall deposit into escrow, upon request, any additional funds, instruments, documents, instructions, authorizations, or other items that are necessary to enable you to comply with demands made on you by third parties, to secure policies of title insurance, or to otherwise carry out the terms of their instructions and close this escrow. If conflicting demands or notices are made or served upon you or any controversy arises between the parties or with any third person arising out of or relating to this escrow, you shall have the absolute right to withhold and stop all further proceedings in, and in performance of, this escrow until you receive written notification satisfactory to you of the settlement of the controversy by written agreement of the parties, or by the final order of judgment of a court of competent jurisdiction.
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> "*All of the parties to this escrow, jointly and severally, promise to pay promptly on demand, as well as to indemnify you and to hold you harmless from and against all administrative governmental investigations, audit and legal fees, litigation and interpleader costs, damages, judgments, attorneys' fees, arbitration costs and fees, expenses, obligations and liabilities of every kind (collectively 'costs') which in good faith you may incur or suffer in connection with or arising out of this escrow, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly, and whether at trial, or on appeal, in administrative action, or in an arbitration.* You are given a lien upon all the rights, titles and interests of the parties and all escrow papers and other property and monies deposited into this escrow to protect your rights and to indemnify and reimburse you. *If the parties* do not pay any fees, costs or expenses due you under the escrow instructions or *do not pay for*

> *costs and attorneys' fees incurred in any litigation,* administrative action and/or arbitration, on demand, *they each agree to pay a reasonable fee for any attorney services which may be required to collect such fees or expenses, whether attorneys' fees are incurred before trial, at trial, on appeal* or in arbitration." (Italics added.)

The end of the three-page document contains the parties' signatures. Chen again signed as the buyer. Following Chen's signature (as well as the seller's signature) is the phrase "Read and Approved by," followed by the typed names and handwritten signatures of Shen and her husband.

On December 15, 2004, the parties executed "Amended Escrow Instructions." The document was addressed to New Century and Suh. By it, Chen conveyed some of her 50 percent interest to four other individuals, including Shen and her husband.[2] As a result, the Shens now owned 55 percent instead of 50 percent of the property. The amended instruction reads:

> "Escrow Holder is hereby authorized and instructed to amend the vesting as follows: Mei-Chu Chen, A Single Woman, as to an undivided Sixteen percent (16%) interest, and Hsiu-I Shen and Su-Chin Lin Shen, Husband and wife as Joint Tenants, as to an undivided Fifty five percent (55%) interest, Suchu Wang, An unmarried woman, as to an undivided Twenty Four percent (24%) interest and Judy Chan, A Single Woman, as to an undivided Five Percent (5%) interest, as Tenants in Common.
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> "*Buyer and seller agree to indemnify, defend and hold escrow holder, it's [sic] employees and officer of the corporation, real estate agents and/or brokers harmless from any liability or loss in connection with this instruction.*

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[2] All of these individuals are members of Shen's family. Su-Chu Wang and Mei-Chu Chen are Shen's nieces. Judy Chan is Wang's daughter-in-law.

"All other terms and conditions of this escrow shall remain the same. All parties signing this instruction acknowledge receipt of a copy of same." (Italics added.)

In addition to Chen, the four individuals identified in the instructions as partial owners (including Shen) signed the amendment under the heading "Buyer(s)."

Escrow closed on December 22, 2004. The recorded deed of trust reflected the proportionate ownership set forth in the special escrow instruction.[3]

2. *The Lawsuit*

On June 29, 2006,[4] Shen filed a lawsuit against six defendants. The action, initiated approximately a year and a half after escrow closed, named New Century and its alleged agent Judy Chan (Chan).[5] The complaint alleged that New Century had not followed Shen's directions in regard to the escrow of the El Monte property. In particular, the complaint alleged that Chan "mislead, [*sic*] misrepresented, embezzled and defrauded" Shen through her proportionate distribution of Golden Bull's interest in the property. Shen claimed entitlement to a 6 percent interest (as opposed to the 5 percent interest she and her husband had received) based upon her proportionate payment to Golden Bull as compared to

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[3] The deed of trust was subsequently modified but the Shens' share remained at 55 percent.

[4] In this portion of the opinion, all dates refer to 2006.

[5] The lawsuit also alleged wrongdoing by the other defendants in regard to two other parcels of property, neither of which had been the subject of a New Century escrow.

the other buyers' payments. However, the pro rata distribution attacked by Shen (5 percent to her and her husband) was exactly the one set forth in the December 15, 2004 amended escrow instruction set forth above. Regardless, Shen alleged five intentional tort causes of action against New Century and one count for unjust enrichment and requested an award of compensatory and punitive damages.

On July 21, counsel for New Century wrote Shen's attorney. She explained that because she had no record of either Shen or her counsel having reviewed New Century's escrow file, she enclosed a copy of the file for their review. Counsel explained why the action against New Century had no merit and noted the indemnification provisions executed by Shen in favor of New Century. She requested New Century's dismissal from the action within 10 days and agreed to waive any request for attorney fees and costs expended to that point if a dismissal were forthcoming. On the other hand, if the action was not dismissed, New Century would seek "indemnification, and payment of their legal fees and costs, defending what is obvious from a review of the escrow file, a frivolous action filed against it." New Century received no response to this letter.

On August 8, Shen filed a first amended complaint, again alleging five causes of action sounding in tort. In addition to including the prior allegations made against New Century, the pleading now averred that New Century was "an integral part" of the other defendants' "scheme" to defraud Shen. In particular, Shen alleged that Suh (the escrow officer) had "engaged in misconduct by falsely notarizing escrow documents."

After receiving the amended pleading, counsel for New Century wrote Shen's attorney on August 17, explaining (again) why New Century was not a proper party to the action. Citing the indemnification provisions in the escrow instructions, she demanded, on New Century's behalf, "full and complete indemnification from [Shen] with respect to all costs and attorney's fees incurred

and to be incurred in the future for its defense" unless Shen dismissed New Century from the action by August 23. Receiving no response, New Century filed a demurrer to the first amended complaint on September 7. The demurrer was rendered moot after the trial court, on September 21, sustained with leave to amend a demurrer filed by other defendants.

On October 11, Shen filed a second amended complaint. Similar to her earlier pleadings, it contained five intentional tort causes of action and reiterated the allegation that Shen and her husband were have to received 6 percent, not 5 percent, of the interest sold by Golden Bull to Chen.

The next day (October 12), New Century's attorney wrote to counsel for Shen, explaining why Shen's allegations against her client lacked merit and requesting an immediate dismissal.

Shen's counsel did not respond to the above letter. Consequently, on October 18, New Century's attorney sent a letter stating his intent to defend and to hold Shen responsible for "all reasonable and necessary expense[s]," based upon the indemnification provisions in the escrow instructions.

On October 27, Shen added Suh as a defendant to the second amended complaint. (Code Civ. Proc., § 474.)

On November 2, New Century filed a demurrer to Shen's second amended complaint and a motion to strike portions of that pleading. A week later, Suh joined in the demurrer.[6]

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[6] A hearing on these motions was set for November 29. The motions were rendered moot when, as will be explained, Shen dismissed the causes of action against New Century and Suh on November 28.

On November 8, New Century demanded, via letter, that Shen provide "full and complete indemnification . . . with respect to all costs and attorney's fees" incurred by Suh in defending against the action.

On November 17, Shen tendered a third amended complaint which no longer included New Century and Suh as defendants. Shen offered to dismiss the case against New Century and Suh without prejudice.

On November 28, Shen dismissed without prejudice all causes of action pending against New Century and Suh. By that point, Century was preparing responses to Shen's discovery and conducting discovery of its own.

The record does not reflect whether the trial court granted Shen leave to file her third amended complaint. We simply note that, insofar as the El Monte property is concerned, the proposed pleading sought reformation of the deed to recapture the additional one percent ownership to which the Shens contended they were entitled.

3. *New Century Moves for Indemnification*

On December 12, New Century, relying upon the indemnification provisions in the escrow instructions and Code of Civil Procedure sections 1021 and 1033.5, subd. (a)(10)(A), moved for an order directing Shen to pay its and Suh's reasonable attorney fees and costs of $62,245.70. Suh (New Century's president) submitted a detailed eight-page declaration explaining why the allegations against New Century found in Shen's pleadings lacked merit. Declarations from counsel and billing statements established New Century's entitlement to $62,245.70 in attorney fees and costs. In addition, New Century filed a six-page costs memorandum.

Shen's opposition urged that she had properly named New Century and Suh because they had participated "in escrow fraud and notary fraud" but that she had

dismissed them from the action "as an economic decision [d]ue to the fact that so many defendants are liable for the same offenses, [she] did not want to spend the extra monies battling New Century for a judgment that other defendants will satisfy." Because Shen had voluntarily dismissed New Century and Suh without prejudice, she contended that they were not prevailing parties. From that, she urged that the fee request was nothing more than an improper attempt to circumvent Civil Code section 1717 by characterizing attorney fees as costs. Shen offered no analysis of the indemnification provisions found in the escrow instructions.

New Century's reply pointed out that Shen's lawsuit had not been an action on a contract containing a prevailing party/attorney fees clause but an action grounded in tort and that its request for attorney fees was based upon an indemnification provision, not an attorney fees clause. Thus, New Century argued that Civil Code section 1717 was inapplicable and Shen's dismissal did not bar its claim for costs, including attorney fees.

At the first hearing held on the motion, New Century reiterated it was relying upon the indemnity provisions in the escrow instructions. Shen's counsel urged, for the first time, that the indemnity provision applied only to third party claims. He conceded that Shen had signed the escrow instructions and specifically disavowed any claim that her signatures were forgeries. The court continued the matter to permit the parties to brief "whether a dismissed defendant [New Century] can litigate entitlement to express contractual indemnity in an attorneys fees motion."

Thereafter, the parties filed supplemental briefs. Shen urged that the indemnity provisions in the escrow did not apply for several reasons. In that context, Shen made the passing suggestion that New Century had offered no evidence to show that the parties understood the provisions to apply to first party

claims.[7] Shen, however, offered no evidence about her understanding of the provisions or her intent in signing the escrow instructions. Nor did she offer any evidence of custom and usage in the escrow profession to support her interpretation of the indemnification provisions.

At the beginning of the second hearing held on the motion, the trial court read its tentative ruling granting New Century's motion. While Shen's counsel offered various counter-arguments, he never urged that Shen had not agreed to be bound by the indemnification provisions. The trial court held that the indemnity provision in Paragraph 21 covered New Century's claim against Shen. The court further found that New Century had acted in good faith in incurring attorney fees and that its costs were reasonable.[8] The trial court therefore granted New

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[7] Her brief read: "New Century has not provided any evidence of the parties' understanding regarding Paragraph 21 or that they ever communicated their understanding to each other. Paragraph 21 is boilerplate buried deep in New Century's form escrow instructions. There is no evidence that the parties understood that it applied to 'inter party' litigation as New Century now conveniently claims."

[8] The trial court explained: "[G]ood faith . . . has been shown by [New Century's] voluntary provision of the escrow file on [Shen's] counsel on 6/21/06 having had no record that [Shen's] counsel ever requested a copy of same prior to filing the lawsuit which showed that there was no basis for the 1 percent claim given the instructions; two, correspondence to [Shen's] counsel advising that [Chan] was never employed by [New Century] and had no connection to it. . . . [¶] [New Century's] counsel, furthermore, made efforts to have [New Century] dismissed and, in exchange for a waiver of cost[s], advised that an attempt to recover costs and fees would occur if a dismissal was not forthcoming. [New Century] made every attempt to minimize its litigation expenses by obtaining an early dismissal, but [Shen] and/or her counsel refused to take any action on these requests." "I'm going to grant this and award attorney's fees in the amount of $62,245.70. That's what it costs this day to gear up on a lawsuit [on] two fronts, try to prevent it and defend it. So I'm going to award the full amount. I don't see any evidence that things were done here that shouldn't have been done or it was overdone or there was any overbilling, that sort of thing. That's what it costs these days to defend a lawsuit."

Century's motion, ordering Shen to pay it $62,245.70 in attorney fees and costs.[9] This appeal by Shen follows. (Code Civ. Proc., § 904.1, subd. (a)(2).)

DISCUSSION

A.

Shen first urges that there is "no evidence that [she] agreed to" the indemnification provision found in paragraph 21 of the escrow instructions. She concedes that her signature appears twice in the November escrow instructions[10] but seeks to avoid the legal consequence of those signatures by constructing the following argument. First, she notes that the November 2004 escrow instructions were never formally amended to name her as a buyer (the instructions named Chen as the buyer) and the additional escrow instructions in which the indemnification provision appears as paragraph 21 were never revised to indicate she signed as a party (the instructions provided, instead, that she "read and approved" them). From this, Shen argues: "New Century presented no evidence that Shen knew about, let alone agreed to, Paragraph 21." As for the December 2004 amended escrow instructions which contain the second indemnification provision and which Shen did sign as a "Buyer," Shen claims that this document was "not a true amendment of the Escrow Instructions because it is not signed by Golden Bull [the

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[9] This includes the money expended by New Century to defend Suh. Although Shen had argued in the trial court that New Century could not recover the costs of defending Suh, Shen has abandoned that argument on appeal.

[10] Shen claims that "she signed page 3 of the Escrow Instructions approximately one month after the escrow was opened" but points to no evidence in the record to substantiate that claim.

seller], and it does not alter or change any of the underlying terms and conditions of the Escrow Instructions."

Shen's arguments lack merit. Under the objective theory of contracts, "mutual consent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 116, p. 155.) "The real but unexpressed state of a party's mind on the subject is immaterial. [Citations.] Under this objective test, a 'meeting of the minds' is unnecessary. A party may be bound even though that party misunderstood the terms of a proposed contract and actually had a different undisclosed intention. [Citation.]" (13 Cal. Forms of Pleading and Practice—Annotated (2007) Contracts, § 140.22[3][b], p. 140-37.) In particular, "one who accepts or signs an instrument, which on its face is a contract, is deemed to consent to all its terms, and cannot escape liability on the ground that he or she has not read it." (1 Witkin, *supra*, Contracts, § 118, p. 157.)

In sum,"'[a] contract is indeed the result of objective manifestations of the parties. If those manifestations are sufficient [to establish a contract], the parties' subjective intentions or beliefs are wholly immaterial.' [Citation.] Stated otherwise, when a person with capacity of reading and understanding an instrument signs it, in the absence of fraud or imposition he is bound by its contents, and he is estopped from saying that its provisions are contrary to his intentions or understanding. [Citation.]" (*Estate of Wilson* (1976) 64 Cal.App.3d 786, 802.)

In light of the above principles, New Century met its burden of proving that Shen had agreed to the indemnification provisions by producing escrow instructions (the authenticity of which Shen did not contest) which were signed by her in several places (signatures which Shen conceded were genuine) indicating her acquiescence to all of its terms including the indemnity provisions. Contrary to

what Shen suggests, it was not New Century's obligation to "produce . . . deposition testimony, declarations, or other evidence that Shen actually agreed to [the indemnification provision in] Paragraph 21." If Shen wanted to advance a legally cognizable basis to avoid the effect of her agreement to the indemnification provisions, it was her burden to produce *evidence* in the trial court to substantiate that claim.[11] She failed to do so. Her trial court brief made only a passing reference to the point.[12] The claim has therefore been forfeited. (See *Building Maintenance Service Co. v. AIL Systems, Inc.* (1997) 55 Cal.App.4th 1014, 1030, fn. 7 [whether an agreement was an adhesion contract is a factual matter that first must be litigated in the trial court].)

In a similar vein, we reject Shen's argument that the November escrow instructions' failure to formally characterize her as a buyer or to indicate that she signed as a party to the escrow indicates she never intended to be bound by the indemnification provision in paragraph 21. These matters should have been raised first in the trial court where their significance or lack thereof could have been explored factually. They were not. Likewise, the lack of a signature from Golden

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[11] That Wang and Chan did not sign the November 2004 additional escrow instructions containing the indemnification provision in paragraph 21 is irrelevant. Putting aside the fact that they did sign the amended December 2004 escrow instructions containing the *second* indemnification provision, the liability of Wang and Chan for indemnity is not raised on this appeal.

[12] Even to the extent Shen raised it in the trial court, it was an argument about whether the parties understood the indemnification provision to apply to first-party claims. (See fn. 7, *ante*.) As will be discussed, interpreting the scope of the indemnification provision is a question of law for the court to determine.

Bull on the December amended escrow instructions adds nothing to Shen's argument.[13]

B.

Shen next contends that, assuming she is bound by the indemnity provisions found in the escrow instructions, the provisions do not cover first party claims. We disagree.

"An indemnity agreement is to be interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. [Citation.] The extent of the duty to indemnify is determined from the contract. [Citation.] The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties. [Citation.]" (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968-969 (*Myers*).) We review the trial court's decision de novo. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

A contractual provision containing the words "indemnify" and "hold harmless" is an indemnity clause obligating the indemnitor (here, Shen) to pay the indemnitee (here, New Century) for specified losses that the indemnitee sustains. (*Myers, supra,* 13 Cal.App.4th at p. 969.) That language appears both in paragraph 21 in the escrow instructions and in the amended escrow instructions. The issue is whether those contractual provisions embrace a claim for losses caused by the

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[13] Shen's argument that the December instructions did not "alter or change any of the underlying terms and conditions of the Escrow Instructions" is incorrect. It materially changed the direction to the escrow holder as to how the 50 percent interest previously owned by Golden Bull should now be held.

putative indemnitor, e.g. first party claims. The statutory definition of indemnity clearly contemplates that situation. Civil Code section 2772 defines indemnity as "a contract by which one [here, Shen] engages to save another [here, New Century] from a legal consequence of the conduct *of one of the parties* [here, Shen], or some other person." (Italics added.) Furthermore, case law has recognized that an indemnity provision can include first party claims. (See *Dream Theater, Inc. v. Dream Theater* (2004) 124 Cal.App.4th 547, 555; *International Billing Services, Inc. v. Emigh* (2000) 84 Cal.App.4th 1175, 1183.)

Wilshire-Doheny Associates, Ltd. v. Shapiro (2000) 83 Cal.App.4th 1380 (*Wilshire-Doheny*) is instructive. There, one issue was the interpretation of two contractual indemnity provisions executed by a corporation. The first indemnity agreement was executed in favor of two its employees (an attorney and a real estate broker). It provided that the corporation "'agrees to indemnify and hold the Indemnitees and their assigns, successors, heirs, and personal representatives harmless against any and all claims, suits, demand, actions, causes of actions [*sic*], damages, set-offs, liens, attachments, debts, expenses, judgments, or other liabilities of whatsoever kind or nature arising out of or related to the actions taken by the Indemnitees on behalf of [the corporate indemnitor] and its affiliates. . . . This indemnification shall include reasonable attorneys fees and costs.'" (*Id*. at p. 1387.) The second indemnity provision was found in an agreement executed when the attorney became a corporate officer. (*Id*. at pp. 1387 & 1395.) That document provided that the corporation "'hereby indemnifies and holds [the attorney/corporate officer] harmless from any and all claims, actions and liabilities brought against him with respect to his [corporate] capacity . . . or any actions he takes in good faith on behalf of the Corporation. This indemnity shall include the cost of reasonable attorneys fees and related expenses.'" (*Id*. at p. 1395.)

Subsequently, the two indemnitees became embroiled in litigation with the corporate indemnitor. The indemnitees prevailed. (*Id*. at pp. 1385-1386.) The two indemnities moved for attorney fees and costs relying upon, among other things, the two indemnity agreements set forth above. The trial court concluded that the indemnity agreements were not broad enough to cover an award of attorney fees in that action.

The court of appeal disagreed with the trial court's ruling. The appellate court explained: "*There is nothing in the language of any of the [two] indemnity provisions specifically limiting their application to third party lawsuits.* [The corporate indemnitor] point[s] to no extrinsic evidence introduced to demonstrate that the parties intended these provisions to apply to third party lawsuits only. [Citations.] Thus, *it has not been shown the indemnity provisions are inapplicable merely because appellants seek indemnification for attorney's fees and costs incurred in an action brought by the indemnitor*." (*Id*. at p. 1396, italics added.) The appellate court therefore reversed and remanded the cause for further proceedings in the trial court in which the indemnitees would be required to make certain showings as called for by the specific language of the two indemnity provisions.[14] (*Id*. at p. 1397, including fn. 8.)

The language in the indemnity provision found in paragraph 21 of the additional escrow instructions is as broad as that found in the indemnity provisions in *Wilshire-Doheny*. In relevant part, it provides that "[a]ll of the parties to this escrow . . . promise . . . to indemnify [New Century] and to hold [New Century] harmless from and against all . . . legal fees, litigation . . . costs, . . . attorneys' fees, . . . expenses, obligations and liabilities of every kind (collectively 'costs') which

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[14] The specific language which required further litigation in *Wilshire-Doheny* is not relevant to any of the issues raised on this appeal.

in good faith [New Century] may incur or suffer in connection with or arising out of this escrow, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly, and whether at trial, or on appeal."

The above provision covers New Century's claim against Shen. New Century sought recovery of the attorney fees and costs it incurred in defending against a lawsuit arising out of its performance of the escrow for the El Monte property. (Whether New Century incurred the costs in good faith is a separate issue to be discussed below.) That the lawsuit was filed by Shen, a party to the escrow, does not negate application of the indemnity provision. Nothing in paragraph 21 limits the promise to indemnify to third party claims. Nor is there any language excluding first party claims. And, in the trial court, Shen offered no extrinsic evidence to establish that the parties intended paragraph 21 to apply only to third party claims.

Furthermore, the indemnity provision in the December 2004 amended escrow instructions, signed by Shen as the buyer, is similarly broad.[15] It reads: "*Buyer and seller agree to indemnify,* defend and hold *escrow holder* . . . harmless from *any liability or loss in connection with this instruction* [explaining the

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[15] Shen argues that this indemnity provision cannot be considered because New Century did not rely upon it in the trial court. That is not entirely correct. While New Century's first motion cited only Paragraph 21 in the November 2004 additional escrow instructions, its supplemental brief *also* relied upon the indemnity provision in the December 2004 amended escrow instructions. In addition, the letters sent by New Century's counsel in July and August 2006 to Shen's attorney requesting dismissal of the action in return for a waiver of costs relied upon both indemnification provisions.

Shen also argues that we cannot consider the indemnification provision in the December 2004 amended escrow instructions because the trial court's oral ruling relied only upon Paragraph 21. We are not persuaded in the light of the well-settled principle that we review the trial court's ultimate ruling (Shen required to indemnify), not its reasoning. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19.)

proportionate distribution of the interest acquired by Chen from Golden Bull and conveyed to others, including Shen]." (Italics added.) Nothing limits the indemnity provision to third party claims. Instead, it refers to "any liability or loss" connected to the amended escrow instruction.

Our conclusion that the two indemnity provisions are broad enough to encompass first party claims is supported by the language of paragraph 17 of the November 2004 additional escrow instructions. Paragraph 17 provides:

> "17. *The parties expressly indemnify and hold you [New Century] harmless against third-party claims* for any fees, costs or expenses where you have acted in good faith, with reasonable care and prudence and/or in compliance with these escrow instructions. You are not required to submit any such beneficiary statement and/or beneficiary demand to the parties for approval before the close of escrow unless expressly instructed to do so in writing. Should the party(ies) desire to pre-approve any such beneficiary statement and/or beneficiary demand, the party(ies) requesting the same shall deliver separate and specific written escrow instructions to you." (Italics added.)

Paragraph 17 demonstrates that the parties knew what language to use to limit an indemnity claim to third party claims. It included that language in paragraph 17, but not paragraph 21 or the December amended escrow instruction. That shows an intent not to limit the right to indemnity created by paragraph 21 or the amended escrow instruction to third party claims. Construing either provision to apply only to third party claims would render paragraph 17 meaningless, a result to be avoided. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641; see also *Tanner v. Tanner* (1997) 57 Cal.App.4th 419, 426.)

Shen's counter arguments are not persuasive. She urges that paragraph 21 cannot be construed to create a right to indemnity of first party claims because of the language in its first paragraph. The first paragraph, set forth verbatim earlier, sets forth the parties' obligations to comply with the escrow instructions, including doing whatever was necessary to comply with demands made by third parties on New Century. The paragraph concludes that if "any controversy arises between the parties or with any third person arising out of or relating to this escrow," New Century had the "absolute right" to suspend performance pending resolution of that controversy. From this, Shen argues: "Since the first section of Paragraph 21 deals with demands made on New Century by third parties, or controversies between third parties and the buyer or seller, the only reasonable and logical interpretation of the second section of Paragraph 21 is that it applies to third party claims and not to First Party Claims." That is, she argues that the first section "describes the [only] situations that would give rise to a duty to indemnify New Century, none of which includes First Party Claims. . . . [¶] . . . When both sections are considered, the only reasonable interpretation of Paragraph 21 is that if the buyer and seller get into a dispute between themselves, or if a third party asserts a disputed claim into escrow, and New Century is dragged into the controversy through no fault of its own, it is entitled to be indemnified by the parties to the escrow."

Shen's argument fails for two separate reasons. The first is that it overlooks the explicit language of paragraph 17, set forth earlier, in which the parties agreed to indemnify for any third party claims. This would include the types of claims set forth in Shen's argument in the above paragraph. Thus, to construe paragraph 21 as Shen now urges would render paragraph 17 meaningless. The second is that the argument overlooks the extremely broad language found in the second section of paragraph 21. That section speaks to the duty to indemnify for "administrative

governmental investigations, audit and legal fees" and the obligation to indemnify for costs "of every kind," including those that arise "subsequent to this escrow." These are costs which would arise independent of conflicting third party demands made on escrow. But to interpret the indemnity provision as Shen so narrowly urges would render this language meaningless.

Shen next urges that interpreting paragraph 21 cannot be interpreted as applying to first party claims because its second section "is, at best, ambiguous." She notes that the some of the specified items which must be indemnified clearly involve a third party ("administrative governmental investigations"), or a buyer-seller dispute ("audit and legal fees"), or an interpleader action when a third party makes a disputed claim ("litigation and interpleader costs, damages, judgments, attorney's fees"). Shen argues those phrases create an ambiguity as to whether paragraph 21 creates indemnification for first party claims and that since New Century created the escrow instructions, the ambiguity must be resolved against it by finding no first party indemnification. (Civ. Code, § 1654.) We disagree. The language upon which Shen relies does not create an ambiguity. It merely is an illustrative but not an exclusive listing of the different types of costs for which the parties must indemnify New Century. Further, Shen's argument overlooks the broad language in paragraph 21 we have discussed above which creates the right to first party indemnity.

Lastly, Shen argues that application of the indemnification provisions results in Shen indemnifying New Century for New Century's wrongful conduct in handling the escrow account. This argument is incorrect. New Century did not seek indemnity to recapture money it was compelled to pay because a judgment was entered against it based upon a finding that it had improperly or wrongful discharged its duties as escrow holder. Instead, New Century sought indemnity to recapture the attorney fees and costs expended in defending against a lawsuit that

Shen ultimately dismissed. As already explained, these expenses were covered by the indemnity provisions.

C.

Shen contends that assuming the indemnification provisions applied, the issue of her "duty to indemnify New Century could only be made after a trial on the merits." We disagree.

Ordinarily, attorney fees are not recoverable as costs unless authorized by contract or statute. (*Wilshire-Doheny, supra,* 83 Cal.App.4th at p. 1396.) When authorized by contract, the prevailing party can recover attorney fees as costs pursuant to section 1033.5, subdivision (a)(10)(A) of the Code of Civil Procedure.[16] (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.) Here, the indemnity provisions in the escrow instructions constitute agreements authorizing New Century to recover its attorney fees as costs from Shen. Pursuant to section 1033.5, subdivision (c)(5), the costs can be determined upon a noticed motion. That is precisely the procedure that the parties followed in this case.

Nonetheless, Shen urges: "Issues for trial would include whether Shen agreed to be bound by Paragraph 21, whether Paragraph 21 was intended to apply to First Party Claims like those against New Century and Suh, whether New Century and Suh acted in good faith in handling the El Monte Property Escrow, and whether Shen's claims against New Century and Suh have merit." We disagree.

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[16] On appeal, Shen does not contest that New Century was the prevailing party. (See Code Civ. Proc., § 1032, subd. (a)(4) and *Santisas v. Goodin, supra,* 17 Cal.4th at pp. 602 & 619-622.)

The first two issues posited by Shen are questions involving interpretation of the indemnity agreement for the trial court to resolve. The parties submitted written briefs and oral argument advancing their respective positions on those issues. The trial court resolved the issues in favor of New Century. No more was required.

The third and fourth issues raised by Shen (whether New Century acted in good faith and whether Shen's claims had merit) are not cognizable on New Century's request for attorney fees. Civil Code section 2778, subdivision 3 sets forth what New Century must establish, in addition to the applicability of the indemnification agreements, to recover its attorney fees. The statute provides: "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of defense against such claims, demands, or liability *incurred in good faith, and in the exercise of a reasonable discretion*."[17] (Italics added.) "The requirement of good faith and discretion refers to the incurrence of costs, not to the incurrence of the claims, demands, or liability." (14A Cal.Jur.3d (2008) Contribution and Indemnification, § 59, p. 432, citing *Buchalter v. Levin* (1967) 252 Cal.App.2d 367, 371-374.) Shen therefore errs in claiming that a trial was needed to determine the good faith of New Century's handling of the escrow or the merit of Shen's now-dismissed claims. Instead, the issues for the trial court to resolve were whether New Century incurred its costs (including attorney fees) in

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[17] This statutory provision was reflected in the provision of Paragraph 21 permitting indemnity for attorney fees and costs "*which in good faith [New Century] incur[s] or suffer[s]* in connection with or arising out of this escrow, whether said costs arise during the performance of or subsequent to this escrow, directly or indirectly." (Italics added.)

good faith and in exercise of its reasonable discretion.[18] That, in fact, is how New Century presented the issue to the trial court in its supplemental brief[19] and how the trial court resolved it at the (second) hearing.[20] Shen, in fact, presents no argument on appeal that the record does not support the trial court's resolution of those factual issues. No more need be said.

D.

New Century seeks an award of attorney fees and costs on appeal. The request is well-taken. Paragraph 21 specifically provides for New Century's recovery of attorney fees on appeal. The amount is to be determined in the first instance by the trial court. (See, e.g., *Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88 Cal.App.4th 1381, 1393.)

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[18] Shen's supplemental brief in the trial court urged that "a trial on the merits" was required but limited the trial to whether New Century had acted in good faith in its handling of the escrow account. (Capitalization omitted.) As explained above, that is not the good faith showing New Century was required to make.

[19] For instance, New Century urged that its good faith had been shown by "all the correspondence asking [Shen] to drop the lawsuit, offering to waive fees, demanding indemnity, and showing faultlessness regarding the merits of the case."

[20] See footnote 8, *ante*.

DISPOSITION

The order appealed from is affirmed. New Century is to recover its costs on appeal, including attorney fees, in an amount to be determined by the trial court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.